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No. 88-1698

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

PHELPS DODGE CORPORATION,
Petitioner,

v.

UNITED STEELWORKERS OF AMERICA, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

BERNARD KLEIMAN
CARL B. FRANKEL
UNITED STEELWORKERS OF AMERICA
Five Gateway Center
Pittsburgh, PA 15222

MICHAEL H. GOTTESMAN
JEFFREY FREUND
(Counsel of Record)
BRUCE R. LERNER
BREDHOFF & KAISER
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 833-9340
Attorneys for Respondents

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Whether this Court should review the *en banc* decision of the United States Court of Appeals for the Ninth Circuit, which held that, based on the factual record before it, the District Court should have denied petitioner's motion for summary judgment.

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The sole issue decided by the court below was one unique to the evidentiary record in this case, *viz.*, whether respondents had proffered evidence sufficient to entitle them to get to a jury (and thus to avoid summary judgment) on their claim that petitioner had conspired with public officials to deprive respondents of their constitutional rights. By a vote of 9-2, the court of appeals concluded that the evidence proffered by respondents was sufficient, and accordingly that petitioner's motion for summary judgment should have been denied. Petitioner seeks to bring this determination respecting the strength

of the evidentiary record before this Court for review, pretending that it is founded on weighty and debatable legal constructs. The effort is a charade.[1]

1. First, contrary to petitioner's principal contention, the court of appeals approached the summary judgment question with a proper understanding of, and in complete conformity to, this Court's rulings in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The majority opinion, authored by Judge Wallace, began by reciting the holding of *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). (See Pet. App. A8-A10.) The court then explained that *Celotex* and *Liberty Lobby* had altered the approach to resolving summary judgment motions in conspiracy cases from that indicated in *Adickes*. (*Id.* A10-A13.) The court stated that, had this Court furnished "no further guidance" after *Adickes*,

> we would decide this appeal based on whether Phelps Dodge had foreclosed the possibility of the existence of facts from which an inference of conspiracy could be drawn. Phelps Dodge would have the burden of showing the absence of a genuine issue as to any material fact, and any unexplained gaps in the record would be held against it. [Pet. App. A10]

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[1] The Court may fairly wonder why, as the sole issue decided by the *en banc* court was one respecting the strength of an evidentiary record, the court below thought the case worthy of *en banc* consideration. The reason is that the *panel* decision, which held petitioner entitled to summary judgment, had ruled that a civil rights conspiracy must be proved by "direct evidence," and on that basis refused to accord weight to what it regarded as an entirely circumstantial submission by respondents. (Pet. App. B9 n.1). That ruling was wrong as a matter of law. But it was also wrong as a matter of fact. The *en banc* court concluded that there was "direct and highly probative evidence" of petitioner's participation in a conspiracy, in addition to the "abundant circumstantial evidence" (*Id.* A22), so that the *en banc* court did not have occasion to address the panel's legal error.

"But the Supreme Court has given additional guidance in [*Liberty Lobby* and *Celotex*]." *Id. Celotex* clarified *Adickes*, the court below explained, by holding

> that on an issue where the plaintiff has the burden of proof, the defendant may move for summary judgment by pointing to the absence of facts to support the plaintiff's claim. 477 U.S. at 322-23. The defendant is not required to produce evidence showing the absence of a genuine issue of material fact with respect to [that] issue . . . . [Pet. App. A12.]

Liberty Lobby addressed the quality of the showing required of the non-movant if it is to resist such a motion, and, as described in the opinion below, established that

> when a defendant moves for summary judgment, the trial court must determine from the record whether "a fair-minded jury could return a verdict for the plaintiff on the evidence presented." . . . The possibility that the plaintiff may discredit the defendant's testimony at trial is not enough . . . . Mere submission of affidavits opposing summary judgment is not enough; the court must consider whether the evidence presented in the affidavits is of sufficient caliber and quantity to support a jury verdict for the nonmovant . . . . This approach to evaluating a summary judgment motion is similar to the inquiry courts make to determine the appropriateness of a directed verdict pursuant to Fed. R. Civ. P. 50(a). [Pet. App. A10-A11 (quoting and citing *Liberty Lobby*).]

From these premises, the court below identified the issue—the only issue—that it was called upon to decide at this stage of this litigation:

> We therefore must determine whether the Steelworkers presented "concrete evidence from which a reasonable jury could return a verdict in [their] favor." *Liberty Lobby*, 477 U.S. at 256. [Pet. App. A13.]

It is this issue, and only this issue, that would be before this Court were it to grant the petition for certiorari.

2. While the sufficiency of a particular evidentiary record hardly seems a matter worthy of this Court's plenary attention, the majority below was plainly correct in concluding that respondents had proffered enough evidence to require denial of the summary judgment motion. The court below cited the following in support of its conclusion:

a) It is not disputed—and was assumed *arguendo* by petitioner in the courts below—that a number of public officials had violated respondents' civil rights in the course of a lawful strike by respondents against petitioner. A jury, after trial against the county, the county sheriff, and several of the sheriff's deputies, answered interrogatories finding that some respondents had been arrested without probable cause, that all had been subjected to excessive bail conditions, and that the sheriff and several deputies had discriminated against respondents and in favor of strikebreakers in carrying out their law enforcement duties. The damage verdicts exceeded $200,000.[2] It also was clear that the actions of the Justice of the Peace and the County Prosecutor were integral to the infliction of these constitutional violations, albeit they had secured their dismissal from the lawsuit on the basis of absolute immunity.[3] These public

[2] The jury verdict and interrogatory answers came while the instant appeal was pending before the panel in the Ninth Circuit, and were attached as an Appendix to the Reply Brief of Appellants United Steelworkers of America, *et al.* At the time that the district court had the summary judgment motion before it, the jury trial had not yet occurred, but even at that stage petitioner assumed *arguendo* that the public officials had committed the civil rights violations alleged.

[3] As the court below recounted, the Justice of the Peace issued arrest warrants without requiring any showing of probable cause, and followed unorthodox procedures—contrary to her usual practice

officials met with each other and planned and agreed upon the course of conduct found unconstitutional by the jury. (*Id.* A15, A16.) It is this body of evidence to which the court below referred in declaring that there was a "smoking gun" and asking whether petitioner "helped pull the trigger." (*Id.* A21.)

b) There was abundant evidence that petitioner had powerful ties to, and leverage over, nearly all of the public officials whose actions contributed to the constitutional violations. Petitioner owned virtually the entire community, a classic "company town." (*Id.* A14.) The Justice of the Peace, who issued the arrest warrants without probable cause and set the excessive bail (see n.3, *supra*), was a security guard employed by petitioner; she was on leave to serve in the judicial position for which petitioner had nominated her; her close relatives worked for petitioner; she lived in housing rented from petitioner; and her automobile license plate ("PD AJO") proclaimed her attachment to petitioner (*id.* A14). Several of the sheriff's deputies were former employees of petitioner; several currently had spouses and relatives working for petitioner, some as strikebreakers; many lived in housing rented from petitioner. (*Id.* A15.)

c) There was abundant evidence—including evidence of specific meetings between petitioner and the public officials—to show that petitioner had pressured these public officials to arrest respondents and set bail so high that they would be kept "off the streets" (*id.* A15-A17, A21-A22), and that the public officials reluctantly acquiesced in petitioner's demands although their official judgments were that the course was neither warranted nor wise. Indeed, the public officials had publicly de-

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—in setting $15,000 bail for each arrestee without inquiry into their individual circumstances or the strength of the case against each. (Pet. App. A16-A17, A22-A23.) The County Attorney sought the arrest warrants, and high bail, without proffering the usual justifications. (*Id.*)

clared that they thought the community's interests would be better served if there were *not* arrests of strikers. (*Id.* A16.)

d) The record was replete with evidence that petitioner was in virtually constant communication with the law enforcement officials, and that over an extended period of time those officials unconstitutionally discriminated against strikers and in favor of strikebreakers in enforcing the law. (*Id.* A17-A18.) That discrimination served petitioner's interest in operating its facility with strikebreakers, but served no apparent public interest.

The record evidence supporting respondents' contention that petitioner participated in a conspiracy to violate their constitutional rights is in truth far more detailed than the recitation in the opinion of the court of appeals. A full accounting appears in respondents' briefs to that court.[4] Were this Court to grant the petition for certiorari, we would of course rely on the entirety of that evidence to support the judgment below. The central point, however, is that this Court's plenary jurisdiction has better uses than to study the three volumes of evidence introduced by respondents in opposition to petitioner's summary judgment motion in order to second-guess the assessment of nine Court of Appeals' judges that a triable evidentiary case resides therein.

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[4] See Brief of Appellants United Steelworkers of America, *et al.*, 4-18, 22-24; Reply Brief of Appellants United Steelworkers of America, *et al.*, 2-13.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

BERNARD KLEIMAN
CARL B. FRANKEL
UNITED STEELWORKERS
OF AMERICA
Five Gateway Center
Pittsburgh, PA 15222

MICHAEL H. GOTTESMAN
JEFFREY FREUND
(Counsel of Record)
BRUCE R. LERNER
BREDHOFF & KAISER
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 833-9340
Attorneys for Respondents